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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 647

SOUTH FLORIDA TELEVISION CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, and L. B. WILSON, INCORPORATED, *Respondents*

On Petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT L. B. WILSON, INCORPORATED IN OPPOSITION

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REPORTS BELOW AND JURISDICTION

The statements contained in the petition for a writ of certiorari in this case concerning opinions below and jurisdiction are considered adequate.

QUESTIONS PRESENTED

Respondent L. B. Wilson does not agree with the petitioner that the question concerning a preference to a renewal applicant because of incumbency *per se* is properly presented in this case, since the decision of the Federal Communications Commission did not involve this question. The respondent respectfully suggests to this Court that the issue presented by this case is as follows:

Whether the Federal Communications Commission accorded a fair hearing to all applicants in this case, considered all relevant facts, evaluated the claims of the competing applicants, adequately explained the reasons for its ultimate conclusion and rendered a decision within its authority to select among competing applicants in accordance with the public interest, convenience and necessity.

STATUTE INVOLVED

Relevant provisions of the governing statute have been set forth in the petition.

STATEMENT

Although the respondent cannot adopt the petitioner's statement of the facts in this case, a full counter statement of the facts would be unnecessarily long and might obscure the differences between respondent's and petitioner's view of this case. Consequently, the respondent accepts for purposes of discussion the petitioner's statement, with the following important modifications and additions:

Although it is not actually relevant to this appeal, the respondent cannot accept as factual the opinion

set forth in the petition (Pet. 3) that the Commission decided in 1957 that L. B. Wilson, Incorporated (sometimes hereinafter referred to as Wilson) was the least qualified of the four applicants who originally competed for Channel 10. The decision upon which the petitioner relies for this statement of opinion was set aside by the Commission because of unlawful attempts to influence the Commission. *WKAT, Inc.* v. *Federal Communications Commission,* 111 U.S. App. D. C. 253, 296 F. 2d 375 (1961), *cert. denied sub nom. Public Service Television, Inc.* v. *Federal Communications Commission,* 368 U.S. 841 (1961). A decision of this nature should not be used to support such an expression of opinion. Significantly, one Commissioner found Wilson the best qualified applicant at that time. *WKAT, Inc.,* 22 FCC 117, 210.

The petitioner's reference (Pet. 3-4) to a grant "by default", is taken out of context and might be misleading. Actually, the Commission stated, in granting the Wilson application for a construction permit: "The Commission is, however, aware and has considered that the peculiar circumstances of this matter have resulted in a *type of award by default.* Consequently, the *license period* contemplated herein will be for four months subsequent to construction, rather than for the three year period which has been customary." *WKAT, Inc.,* 29 FCC 216, 218 (1960) (emphasis supplied).

The Commission order of February 16, 1962 (Pet. 4) directed Wilson to file an application for renewal of its license by March 20, 1962, and recognized that since Wilson had operated for less than a full year, it would not be able to utilize the normal composite week in furnishing to the Commission information on *past program performance.* A special week was

specified so that such information on past licensee performance could be considered in passing upon this application for renewal (J.A. 5-7).[1]

The petitioner's characterization of the Commission's summarization of its preference for Wilson is misleading. By quotation out of context, it incorrectly portrays the weight which the Commission attached to Wilson's past broadcast record. Full quotation is required to state accurately the basis for the Commission's preference for Wilson:

> "It has achieved a combination of factors in no way approached by any other applicant. Majority stockholders having local residence, local civic associations, and many years of broadcast experience would be integrated on a full time basis. These stockholders would hold positions enabling them to bring to bear in the operation these qualifications on both a policy level and on the day to day operations of the station. *Unnecessary to establish this superiority,* but adding somewhat thereto, is its past broadcast record." *L. B. Wilson, Inc.,* 37 FCC 511, 523 (1964) (emphasis supplied).

It also must be noted that Wilson was the only applicant in the proceeding with a past broadcast record, and that the Commission's preference for Wilson was based in part upon operation of a standard broadcast station and was held to be "minor in nature". (37 FCC at 521-522).

ARGUMENT

The issue which the petitioner seeks to present to this Court is not properly in this case at this stage.

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[1] The reference is to the Joint Appendix included in the certified record before this Court.

It is true that questions concerning Wilson's status as a renewal applicant and the question of Wilson's right to demonstrate its record of past performance were raised before the Commission. However, this case was decided by the Commission and affirmed by the Court on grounds unrelated to the question which the petitioner seeks to raise. The Commission's award to Wilson was based upon application of traditional criteria employed by the Commission in selection among competing applicants. These criteria are not attacked by the petitioner. This reasoned and reasonable judgment of the agency charged with primary responsibility in such cases was affirmed by the Court of Appeals after a careful review of the petitioner's contentions.

Arguing primarily from conjecture, the petitioner has sought to establish a "consistent" practice of the Commission to favor an incumbent licensee seeking a renewal. If such practice does indeed exist, and petitioner has not established that it does, the practice had no effect upon the Commission's decision in this case.

A. This case presents no question of violation of the Communications Act

The petitioner's argument in support of its request for a writ of certiorari is dependent upon its attempts to establish (1) that it is the consistent practice of the Commission to favor an incumbent licensee seeking renewal and (2) that the Commission unfairly followed this practice in this case. This contention is supported only by conjecture concerning Commission policy and an erroneous view of the Commission's action in this case.

As the Commission observed in its brief before the Court of Appeals in this case (Pg. 15, fn 3) the only "favorable position" which a renewal applicant occupies in competition with a new applicant for the same broadcast facilities, "stems from the probative weight attached to his demonstrated record of performance as against the untested promises of the new applicant." *Wabash Valley Broadcasting Corp.*, 1 Pike & Fischer RR 2d 573 (1963), *Hearst Radio, Inc.*, 6 Pike & Fischer RR 994 (1951).

Contrary to the petitioner's contention, no "clear" Commission policy favoring incumbency *per se* has been established. In the trial of this case before the Commission, Wilson sought to establish that such a policy did and should exist, relying in part upon cases cited by the petitioner.[2] The Commission did not accept this view of the case. No inherent preference was accorded to Wilson as a renewal applicant.

The Commission's decision was based upon application of those established comparative criteria traditionally utilized in selection among competing applicants for broadcast facilities. Wilson's superiority over the other three applicants was based upon the fact that a controlling majority of its shareholders with close local identification and many years of broadcast experience would bring their skills directly into the operation of the station on a day-to-day basis. Wilson's past performance in operation of the station was not even necessary to establish this superiority. In contrast by way of example, petitioner South Florida Television Corporation (South Florida) was controlled by

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[2] See *Evangelical Lutheran Synod* v. *Federal Communications Commission*, 70 U.S. App. D.C. 205, 105 F. 2d 793 (1939) and cases cited by petitioner (Pet. 8, 9).

an 80% stockholder with absolutely no broadcast experience whose testimony concerning proposed participation in operation of the station was found by the Commission to be incompetent to establish a definable degree of participation in station operation (37 FCC at 520). Under these circumstances, it is not surprising that the Court of Appeals found that the Commission's decision "was the result of a reasoned and reasonable judgment of the agency charged with primary responsibility in the matter." The court below has fully considered the petitioner's contentions on appeal and rejected them.

B. The petitioner was accorded a full and fair hearing by the Commission

Contrary to the petitioner's contention, there is no conflict between this case and the decisions of this Court and the Court of Appeals in the *Ashbacker*[3] and *Community*[4] cases. These cases established the proposition that when two or more parties apply for a *new* facility, the Commission may not issue operating authority to one pending the outcome of a hearing except under extraordinary circumstances. They are unrelated to the facts in this case.

Wilson's application was first filed in 1953. After a complicated course of litigation, it was granted in 1960. The grant contemplated a limit upon the term of the license, but specifically provided for licensed operation. Wilson went on the air on Channel 10 in Miami in November of 1961, before the petitioner corporation was even formed. When the Commission

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[3] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945).

[4] *Community Broadcasting Co.* v. *Federal Communications Commission*, 107 U.S. App. D.C. 95, 274 F. 2d 753 (1960).

ordered Wilson to file an application for renewal of license in February of 1962, it specified special days which Wilson should use to demonstrate its past performance. This is the same order which set the date for filing of the petitioner's application. Under these circumstances petitioner's claim that it was unfairly prejudiced by the Commission's consideration of Wilson's past programming cannot be considered seriously. It had clear notice that the Commission planned to consider Wilson's programming performance in connection with its renewal application. The *Ashbacker* and *Community* cases cannot be construed to require that the Commission must ignore the past performance of an applicant for renewal of license. In any event, the Commission's decision in this case did not turn upon a question of past performance. The petitioner's claim of prejudice lacks foundation in the record of this case.

CONCLUSION

This case concerns no important question warranting review by this Court. The unusual factual circumstances which resulted in the initial award to Wilson are not likely to recur with any frequency. The petition for writ of certiorari should be denied.

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